CHANCERY COURT FOR CITY OF RICHMOND.

NEW YORK LIFE INS. CO. *v.* WM. N. FARTHINGS' ADMR. & OTHERS.

April 2, 1915.

1. Insurance—Assignment to Person without Insurable Interest.—Under § 2859a of the Code, the insured may make a valid assignment of the policy to a person having no insurable interest in his life, for a valuable consideration, as any other chose in action.

[Ed. Note—For other cases, see Life Insurance, 9 Va. & W. Va. Dig. 347.]

2. Same—Same.—Where an insurance policy was taken out payable to the wife of the insured with right of revocation, and after the death of the wife is delivered to an assignee for valuable consideration, it was held, in an action between the administrator and the assignee that the assignee was entitled to the full amount of the policy, and is not restricted to the amount of the consideration paid together with such premiums as were paid to preserve the policy, with interest thereon.

3. Same—Assignment by Delivery.—Under § 2859a which provides that a policy of insurance may be assigned as any other chose in action, the assignment may be made by delivery of the policy with intent to assign it, notwithstanding the requirements of the insurance company for writing lodged with the company and signed by the insured, as an assignment of a chose in action may be made by delivery without writing or other formalities.

[Ed. Note.—For other cases, see Life Insurance, 9 Va. & W. Va. Dig. 349.]

4. Assignments—Assignment of Chose in Action by Delivery.—A chose in action may be assigned by delivery without writing or other formality.

[Ed. Note.—For other cases, see Assignments, 1 Va. & W. Va. Dig. 759.]

5. Insurance—Assignment of Policy — Consideration.—The relinquishment of the interest of the mother and sister of the wife of the insured, who died without issue, in real property of the wife to the insured is a valuable consideration for the assignment of an insurance policy by the insured.

6. Insurance—Assignment of Policy—Evidence.—Evidence of the declarations of the insured together with the fact of the transfer to him of property by the assignee was held sufficient proof that the policy was assigned with intent to pass title.

7. Witnesses—Survivor of Transaction with Deceased.—A witness who is not a party to the suit and has no interest in the event

thereof is not incompetent under § 3346 of the Code to testify to a transaction with a deceased person.

[Ed. Note.—For other cases, see Witnesses, 13 Va. & W. Va. Dig. 932.]

8. Same—Same.—An unnecessary and improper party who has no interest in the suit and is not liable for costs is not incompetent under § 3346 of the Code to testify to a transaction with a deceased person.

INTERPLEADER.

Meredith & Cocke, counsel for New York Life Ins. Co.
Isaac Diggs, counsel for Wm. N. Farthings' Admr.
C. M. Chichester, counsel for M. Ida Duvall.

MONCURE, JUDGE: (1) (2) In May 1909 the insurance company issued its policy on the life of Wm. N. Farthing, payable at the death of insured to Fannie L. Farthing, with right of revocation. Fannie L. Farthing died without issue in February, 1910, and in February, 1913, Wm. N. Farthing died intestate, and his sister, Nettie S. Thurston, qualified as administrator of his estate.

Nettie S. Thurston, as administrator of Wm. N. Farthing, claimed the proceeds of the policy as part of the estate of her intestate to be administered: M. Ida Duvall claimed the proceeds of the policy as assignee of Wm. N. Farthing for value. Not knowing which to pay, the company filed its bill of interpleader, convening the two claimants named above, and also Mary A. Duvall stating that she also was a claimant. By an order of the Court, with the consent of all parties the money has been put into bank to the credit of the Court, and the insurance company released from further responsibility in the premises.

Mary A. Duvall filed her answer to the original bill of interpleader, and to the cross bill of M. Ida Duvall, disclaiming any interest in the said policy and said she was not interested in the matters involved in the suit, and further said the statements in the cross bill of M. Ida Duvall are substantially true.

So that the only persons having any interest in the subject matter of the suit, are Nettie S. Thurston, admr. of the estate of Wm. N. Farthing, deceased, claiming the insurance money, and M. Ida Duvall also claiming it as assignee.

M. Ida Duvall, in her answer and cross bill, claims the benefit of the policy as assignee by transfer of title fully executed by the insured in his life time by delivery to her of said policy with the intention of transferring to her the rights to the proceeds and making her the beneficiary thereunder, and that said transfer was based upon a valuable consideration. Her answer and cross bill further states that her sister, Fannie L. Farthing,

died in February, 1910, interstate, without issue, possessed of money in bank, and two pieces of real estate, one piece in Norfolk City, the other in James City County; that, after her sister's death, Wm. N. Farthing induced her, her other sister and her mother to convey to him their interest in the said real estate of which Fannie L. Farthing died, possessed, and in consideration thereof Wm. N. Farthing promised to leave all of his property to Mary A. Duvall, his mother-in-law, and promised to give to M. Ida Duvall the proceeds of the policy for $1,000.00 in the New York Life, and that the policy was delivered to her, M. Ida Duvall, by Wm. N. Farthing in pursuance of said agreement, and that she has kept the same ever since as her property, and is therefore entitled to the entire proceeds of the policy.

Wm. N. Farthing's administrator claims and asserts M. Ida Duvall had no insurable interest in the life of Wm. N. Farthing, and that the policy is not assignable to a person who has no insurable interest except as security for the sums due by the insured to such assignee and for premiums paid by the assignee to keep up the policy.

In support of this contention the following cases are cited: Roller *v.* Moore, 86 Va. 512; Long *v.* Meriden, etc., Co., 94 Va. 594; New York, etc., Co. *v.* Davis, 96 Va. 737; Tate *v.* Association, 97 Va. 74; Bank *v.* Terry, 99 Va. 194; Crismond *v.* Jones, 10 Va. Appeals, 26; 1 Cooley's Brief on Insurance, page 291.

The first five of those cases, so far as the principles decided by them are applicable to this case, decide, that a creditor may insure the life of his debtor, or may acquire by assignment a policy on his life after it has been issued to the debtor. The interest of the creditor in the policy, however, will be limited to the amount of the debt at the time of the death of the insured, together with such premiums as the creditor has paid to preserve the policy, with interest thereon; and it is immaterial whether the assignment of a life policy by a debtor to a creditor is absolute and unconditional, or is collateral for the amount of the debt. In either case, equity will regard the assignment as only a collateral security.

Crismond *v.* Jones, *supra,* and Cooley's Brief on Insurance, *supra,* show that a son-in-law has no insurable interest on the life of the father-in-law so far as the interest is based on ties of consanquinity or affinity; and the same is true as to brother-in-law and sister-in-law.

It is to be observed that while the case of Crismond *v.* Jones was decided January 11, 1915, the suit was brought and the transactions involved took place before the Acts 1902-3-4, p. 256,

Code, Section 2859-a, and the opinion clearly shows and states that the case is not controlled by that statute.

It is therefore very clear that M. Ida Duvall can claim the benefit of the proceeds of the policy, if at all, only by virtue of the statute, Sec. 2859-a, Code of Va.

(3) (4) But M. Ida Duvall does claim as assignee, while the administrator of Wm. N. Farthing says she is not; that if there was an attempt to assign, it was not completed and not made in accordance with the requirements of the insurance company, that is, by writing ledged with the company and signed by Wm. N. Farthing.

An assignment of a chose in action, may be made by delivery without writing or other formalities.

"A delivery of the policy, with the intention on the part of both parties of thereby transferring certain rights, will operate as an assignment of such rights, without the formality of a written contract."

Brief on the Law of Insurance, Cooley, p. 100, and cases cited.

That a certificate of bank stock can be assigned simply by delivery, see Bank *v.* Holland, 99 Va. at p. 502.

The statute under which M. Ida Duvall claims, Sec. 2859-a, is as follows: "A policy of insurance on life, taken out by the insured himself, or by a person having an insurable interest in his life, in good faith, and not for the mere purpose of assignment, may be lawfully assigned to any one, for a valuable consideration, as any other chose in action, without regard to whether the assignee has an insurable interest in the life insured or not, and the assignee may recover upon it whatever the insured may have recovered but for such assignment."

In the instant case the policy of insurance on Farthing's life was taken and by Farthing himself, and he named his wife beneficiary, after her death he had the right to change the beneficiary. So far as the evidence goes, and there is no suggestion to the contrary. Wm. N. Farthing took out this policy on his life in good faith and not for the mere purpose of assignment, and this being true he had the right under the above statute to assign the policy for a valuable consideration, as any other chose in action. See Grigsby *v.* Russell, 222 U. S. 149 Ann. Cases—1913 B. p. 863 note.

(5) If the testimony of Mrs. Whitaker and of Mrs Duvall is competent, and the competency of these witnesses I shall take up later, the consideration was valuable, being the interest of M. Ida Duvall in two lots, one in Norfolk, one in James City County, of which her sister, Fannie L. Farthing died, possessed, and which on her death intestate, without issue passed by descent to Mary A. Duvall, mother; M. Ida Duvall and Mrs. Whitaker.

M. Ida Duvall was the owner in fee of an undivided third of said lots.

The Norfolk lot cost $475.00, and Mr. Farthing sold the James City County house and lot for $500.00, making the two lots together worth $975.00; M. Ida Duvall's one-third was therefore worth $325.00.

The policy assigned to her was issued in May, 1909, for $1,000.00, twenty payment life, premium, $62.06 annually. At the time of the assignment only one premium had been paid on the policy, so it must have had little or no cash surrender value in April, 1910, when M. Ida Duvall conveyed to Farthing her land. Farthing was forty or forty-five years of age, so that I think the value of her interest in the land $325.00, the consideration paid by M. Ida Duvall for the policy, was not only a valuable consideration, but under the circumstances a big consideration paid by her.

(6) Was the policy assigned, delivered to M. Ida Duvall by Farthing with the intent of passing title?

J. P. Timberlake was the insurance agent who wrote the policy and he says that after the death of Farthing's wife, Farthing told him he wanted to change the beneficiary to M. Ida Duvall.

J. C. Chandler, at one time a partner of Farthing, says Farthing told him he wanted M. Ida Duvall to have his insurance. Mrs. Whitaker says she saw the policy in Ida's possession some time before Farthing's death, and she heard Farthing say that he wanted Ida to have it.

Mary A. Duvall testified that a few weeks after the death of her daughter, Fannie L. Farthing, Wm. N. Farthing, her son-in-law, came in one night, she and Ida being at home, and asked if he could talk a little business, and on being told yes, said he would have to qualify on Fannie's estate. He had seen a lawyer and was advised that he was the distributee of Fannie's personal property, and the Duvalls the heirs as to the real estate. He said it would help him if the Duvalls would convey by deed to him the land his wife Fannie owned. That he said if they did so he would make a will devising the land back to her when he died; and that he would give his insurance to Ida; she said she and Ida agreed to it and he took out of his pocket papers, looked over them and gave the New York policy to Ida, saying "the Va. has already been transferred to you, it is at the store in my safe, and this I will have transferred at once." And when asked what reason Mr. Farthing gave for assigning this policy to M. Ida Duvall, Mrs. Duvall said, "Because she had consented to assign her interest in her sister's property * * *."

The property of which Fannie L. Farthing died, possessed, was conveyed to Wm. N. Farthing in April, 1910, and the con-

versation as related by Mrs. Duvall took place between the date of the death of Mrs. Farthing, February, 1910, and the date of the deeds to Farthing.

(7) Are Mary A. Duvall and Helen Whitaker competent witnesses? Helen Whitaker is not a party to the suit and has no interest in it. Mary A. Duvall is a party to the suit, but clearly she has no interest in it and is not even liable for costs. She long ago filed her answer to the bill and disclaimed any interest in the subject matter of investigation. She is therefore an improper and unnecessary party. It would seem that under these circumstances Mary A. Duvall would be a competent witness at common law. Her testimony is objected to however by Farthings' admr., it being claimed that she is incompetent under Sec. 3346, Va. Code 1904.

In Wright *v.* Collins, 111 Va. at p. 808, Judge Whittle, speaking for the Court, says:

"It may be well to observe, in this connection, that dating from the commencement of its session of 1865-6 the legislature of Virginia has manifested a fixed policy to remove the common law disability of witnesses to testify by reason of interest, and for many other causes both in civil and criminal cases. So far as we are advised it has taken no backward step in that regard, but the tendency of all enactments has been, from time to time, to enlarge the rule of competency."

In the case of Milton *v.* Kite, 114 Va. 256, the deposition of Mrs. Driscoll was objected to as incompetent. Mrs. Driscoll was a party to the suit. Judge Keith, at page 262, said, "Mrs. Driscoll has no interest whatever in this litigation. As between Brown and Kite she is not even liable for costs, and upon that ground her testimony was properly admitted."

See to same effect, Borse *v.* Nalle, 28 Gratt. 434; Knick *v.* Knick, 75 Va. 17. Judge Burks said, "So, conversely, though a person be one of such original parties, he is not for that cause merely incompetent to testify. To make him incompetent, he must also be interested in the result of the suit or as a party to the record; for otherwise he would be a competent witness at common law, and the object of the statute is to remove existing disqualifications in most cases, not to create one in any case."

In Reynolds *v.* Calloway, 31 Gratt. 440, the Court in speaking of the statute said, "The words, 'the other party shall not be admitted to testify in his own favor,' in section 22 plainly indicate that the party here referred to *is a person having an interest in the subject of controversy.*"

(8) Mary A. Duvall has no interest in the subject of controversy, and is not bound for costs. It is true she is a party

to the suit, but it is equally true she is not a necessary party, and so far as I can observe she is not a proper party, and never should have been a party.

I think she is a competent witness, as is also Mrs. Whitaker.

From the evidence, I am of the opinion therefore that M. Ida Duvall had a complete equitable title to the insurance policy as assigned thereof for a valuable consideration. She is therefore entitled to the proceeds of the policy.

Under the ruling of the Court in Pettus *v.* Hendricks, 113 Va. 131, Wm. N. Farthing's administrator will pay the costs of the suit, including the fee of $50.00 paid from the fund to counsel filing the bill.

W. N. Farthing's administrator applied for an appeal, which was refused October 18, 1915.

Note.

Assignment of Insurance Policy—Prior to § 2859a.—Prior to the enactment of § 2859a of the Code, Acts 1902-3-4, it was the law of this state that an assignee of an insurance policy having no insurable interest in the life of the insured could only retain so much of the proceeds of the policy, where the insurance was lawfully effected, as was necessary to reimburse him for premiums paid and expenses incurred, with interest thereon. Tate *v.* Building Association, 97 Va. 74, 33 S. E. 382. See note 3 Va. Law Reg. 832; 9 Va. & W. Va. Dig. 347.

In Roller *v.* Moore, 86 Va. 512, 10 S. E. 241, the court said: "We are of opinion to follow the decisions on this subject of the supreme court of the United States, and those of other courts in accord therewith; and we are of the opinion that, if there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured (which will not be denied), it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which should invalidate the one should invalidate the other, so far, at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject, we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life. * * * To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money."

This case attempted to follow the ruling of the Supreme Court of the United States and was probably justified in declaring the Supreme Court had so held; but such court has recently decided otherwise. In Grigsby *v.* Russell, 222 U. S. 149, 32 S. Ct. 58, Ann. Cas. 1913B, 863, 864, the court said: "Coming to the authorities in this court, it is true that there are intimations in favor of the re-

sult come to by the circuit court of appeals. But the case in which the strongest of them occur was one of the type just referred to, the policy having been taken out for the purpose of allowing a stranger association to pay the premiums and receive the greater part of the benefit, and having been assigned to it at once. Warnock *v.* Davis, 104 U. S. 775, 26 U. S. (L. Ed.) 924. On the other hand it has been decided that a valid policy is not avoided by the cessation of the insurable interest, even as against the insurer, unless so provided by the policy itself. Connecticut Mut. L. Ins. Co. *v.* Schæfer, 94 U. S. 457, 24 U. S. (L. Ed.) 251. And expressions more or less in favor of the doctrine that we adopt are to be found also in Ætna L. Ins. Co. *v.* France, 94 U. S. 561, 24 U. S. (L. Ed.) 287; New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 591, 6 S. Ct. 877, 29 U. S. (L. Ed.) 997. It is enough to say that while the court below might hesitate to decide against the language of Warnock *v.* Davis, there has been no decision that precludes us from exercising our own judgment upon this much debated point. It is at least satisfactory to learn from the decision below that in Tennessee, where this assignment was made, although there has been much division of opinion, the Supreme Court of that state came to the conclusion that we adopt, in an unreported case, Lewis *v.* Edwards, December 14, 1903. The law in England and the preponderance of decisions in our state courts are on the same side." The headnote to this case in Am. Ann. Cas. 1913B, p. 1863 reads: "The holder of a valid policy of insurance upon his own life may make a valid assignment of the policy to a person having no insurable interest in the life of the insured, in consideration of a sum of money and an undertaking to pay the premiums due and to become due, and the assignee takes the entire interest in the policy, as against the personal representatives of the insured." This headnote could be used for the principal case.

Same—Under § 2859a.—Where the facts are those of the principal case, in which the policy is taken out by the *insured* himself and assigned for a valuable consideration, the assignee may recover upon it; for the act provides "the assignee may recover upon it whatever the *insured* may have recovered but for such assignment. But what of the case where the policy is taken out by a "person having an insurable interest in his life in good faith?" The act provides that the policy may, for a valuable consideration, be assigned as any other chose in action. By so providing, the act undoubtedly makes the assignment lawful. But it is further provided "the assignee may recover upon it whatever the *insured* may have recovered but for such assignment." The parties to a contract of insurance are the insurer, insured and beneficiary. While it has been held that the "insured" may be construed to embrace legal representatives, there is no case which goes to the extent of confusing the terms "insured" and "beneficiary," by construing the former to comprehend the latter. See Metgzer *v.* Assurance Co., 102 Mich. 334. Bouvier defines "insured" as "a person whose life or property interest is covered by a policy of insurance." If the legislature meant to use the term "insured" in its accepted sense and as is used in the first part of the act, what may the assignee recover where the policy was taken out by his assignor on the life of the "insured?" In such cases the *insured* may recover nothing at all, and by the wording of the last part of the act the assignee is put in his place. The legislature undoubtedly intended the assignee should have the same right of recovery where the policy was taken out by another as where it was taken out by the insured himself and this construction will probably

be given the statute by the courts by reading into it, after the word "insured," the words "or other persons by whom the policy is taken out," and the meticulous objection here raised will not be regarded.

Same—Question of General or Local Law.—When the question of the validity of an assignment of an insurance policy arises in a federal court, is it to be decided as a question of general or local law? It has been held when the question of the validity of an assignment of an insurance policy arises in a federal court, such court is not bound to follow the local statutes and decisions of the state court. In Russell *v.* Grigsby, 168 Fed. 577, reversed on another point in 222 U. S. 149, it was held that the question whether the contract of assignment was valid or not was not dependent upon local statute or usage, but upon general law, in the determination of which a federal court is under obligation to exercise an independent judgment. See Kopetovske *v.* Mutual L. Ins. Co., 187 Fed. 499. These two cases do not seem to accord with the decisions of the Supreme Court of the United States, where the assignment is made under a state statute. While the Supreme Court has held that the construction of a policy of insurance is a question of general rather than of local law, and the federal courts adopt their own views as to such construction, although the courts of the state in which the cause of action arose have adopted a different view (Carpenter *v.* Insurance Co., 16 Pet. 495), it has held that the decision of a state court as to what rights pass as incident to an assignment is binding on the federal courts. Ober *v.* Gallagher, 93 U. S. 199. The question of the construction and effect of a statute of a state, regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest court of the state, establishing a rule of property, are of controlling authority in the courts of the United States. South Branch Lumber Co. *v.* Ott, 142 U. S. 622, 35 L. Ed. 1136. The Supreme Court of the United States has many times decided that upon the construction of the Constitution and laws of a state, the federal courts as a general rule, follow the decisions of the highest court of the state, unless they conflict with or impair the efficacy of some provision of the federal Constitution, or of the federal statute or a rule of general commercial law.

Same—Manner of Making Assignment.—If the right to change the beneficiary is not given by the policy or by statute, the beneficiary named takes a vested interest in the policy, and where a life insurance policy provides that the beneficiary may be changed by written notice to the company at its home office, accompanied by the policy, to take effect on the indorsement of the same on the policy by the company, no change of beneficiary can be made effective until such conditions have been complied with; the approval of the change being not merely a formal ministerial act. O'Donnel *v.* Life Ins. Co. (Del.), 95 Atl. 289. The court said: "It is settled law that if the right to change the beneficiary be not given by the policy or by statute, then the beneficiary took a vested interest in the policy. Cooley on Insurance, p. 3755, and cases cited; 25 Cyc. 889, 785. The fact that an insurance company may pay the benefit to some one else than the beneficiary named in the policy does not prove that the insured may change the beneficiary."

The policy of the insurance company contained this provision:

"Subject to the approval of the company, the insured may at any time during the continuance of this policy, provided the policy is not then assigned, change the beneficiary or beneficiaries by written notice to the company at its home office, accompanied by this policy,

such change to take effect on the indorsement of the same on the policy by the company."

Because of this provision the beneficiary did not take a vested interest in the policy, and her right was only an expectancy, in that she would take the benefit unless some other person was properly designated to receive payment of the amount due under the policy, or unless the company chose to pay some one of the classes of persons named in the policy. O'Donnell *v.* Life Ins. Co. (Del.), 95 Atl. 289.

In Freund *v.* Freund, 218 Ill. 189, 75 N. E. 925, 109 Am. St. Rep. 283, provisions similar to those in the above policy were considered. It was there held that a change of beneficiary was not effected until the conditions stated in the policy were complied with, and that the principle that where the insured has done all he could to effect a change of beneficiary, but dies before the change is formally made by the company, a court of equity will regard the change as effected, does not apply to a change of beneficiary in a life insurance policy, where the policy requires the endorsement by the company on the policy of its consent to the change. It was held that the approval of the change was not a mere formal ministerial act, not requiring the exercise of discretion.

In the principal case it is held that under § 2859a of the Code of Virginia, a policy of insurance may be assigned as any other chose in action, the assignment may be made by delivery of the policy with intent to assign it, notwithstanding the requirement of the insurance company for writing lodged with the company and signed by the insured, as an assignment of a chose in action may be made by delivery without writing or other formalities.

In order to constitute a valid assignment of a chose in action, the assignor must part with his power of control over it, and the evidence in the assignment must be so delivered as to be irrevocable by the assignor. Coffman *v.* Liggett's Adm'r., 107 Va. 418.

A single man took out a policy of insurance on his life payable to his sister, but with the right to change the beneficiary at any time. Shortly thereafter he married, and several times requested the agent who solicited the insurance to substitute his wife's name as beneficiary, and this the agent promised to do, but through neglect and forgetfulness failed to do so, and the assured died. Thereupon the beneficiary, sister of deceased, intending to assign the policy to the widow, voluntarily executed and delivered to the attorneys of the widow a paper under hand and seal assigning and transferring the policy, but inadvertently omitting the name of the assignee. The assignment also relinquishes all of her interest in said policy, and any and all claims against the insurance company pertaining to said policy. Shortly thereafter the sister repented of her act, claimed that the assignment was obtained by fraud, and that she was still the beneficiary under said policy; but the charge of fraud was not sustained. A bill was filed by the widow against the insurance company and the sister to recover the amount of the policy. Held: A court of equity will write the inadvertently omitted name of the widow into the paper as assignee, and direct the payment of the proceeds of the policy to her. McCraw *v.* Vernon, 111 Va. 279, 68 S. E. 979.

Complainant, in an action to recover the balance due on life insurance policies alleged to have been assigned to defendant only as security for loans negotiated by the insured, had the burden of proving that the assignments, absolute in form, were made as security. Atkin *v.* Van Sickle (Mich.), 153 N. W. 1070.

Survivor of Transaction with Person Since Deceased.—The plain purpose of § 3346 of the Code is to declare that where the lips of one party to the original contract or transaction which is the subject of investigation, are closed in death, the adverse party shall not speak at all, thus putting the parties on terms of equality in regard to the opportunity of giving testimony. Grigsby *v.* Simpson, 28 Gratt. 348. This exception to the general statutory rule of competency, which is one instance of the survival of the common law principle of disqualification because of interest, is in considerable disfavor with those who believe that it is necessary to the rendition of justice to admit all evidence and the legislature may be induced to repeal it at any time.

As an argument in favor of its repeal, it may be said that the exception is based upon the common-law principle that interest goes to the competency rather than to the credibility of the witness, which it was considered was inducive of perjury. The error of this principle was pointed out by the courts and text-writers and corrected by the different legislatures. Under the present day statutory principle, with this exception, interest does not go to the competency but merely to the credibility of the witness. It is contended that this principle should apply as well to a survivor of a transaction with a deceased person as in other cases; and although the exception is said to be based upon the desire to put the parties upon terms of equality, the real reason must necessarily be based upon the fear that the witness would commit perjury, which concerns his credibility merely. Although the courts construe this exception to exclude no witness who was competent at common law, it is difficult to see how the courts can apply such construction; for the simple reason that the common law on this subject, being now considered obsolete, is omitted from text-books, digests and encyclopedias, leaving the field of research merely the reports of the old decisions, which the courts nd lawyers cannot successfully search.

While there are similar statutory provisions in practically all other states, such a provision has been repealed by the legislature of Massachusetts. It is probably true that § 3346 is broader than is necessary and for that reason excludes witnesses in some instances who should be competent to testify. The Minnesota Code contains a less comprehensive provision which is however, a sufficient safeguard against false swearing, and if the legislature of this state should repeal § 3346, it would probably do well to adopt the Minnesota act. Section 5660, Gen. St. of Minn. 1894, is as follows: "It shall not be competent for any party to an action, or interested in the event thereof, to give evidence therein of or concerning any conversation with, or admission of, a deceased or insane party or person, relative to any matter at issue between the parties."